EDINBURGH TRAM PROJECT
REPORT ON TERMS OF FINANCIAL CLOSE ("CLOSE REPORT")

FOR THE ATTENTION OF THE TRAM PROJECT BOARD, TEL BOARD AND TIE BOARD

DRAFT v7 10.03.08

Purpose of report

The principal contractual commitments to be entered into at Financial Close are :

- Infraco Contract Suite – incorporating Infraco and Tramco construction / supply and maintenance ; Tramco and SDS Novation ; security documentation ; ancillary agreements and schedules including Employer's Requirements
- Council Financial Guarantee
- Grant Award Letter
- Operating Agreements between the Council and respectively tie and TEL

Various important agreements with third parties have also been completed or are in substantially agreed form.

Two documents have been prepared to provide a comprehensive view of the principal terms of the contracts and related documents which are being committed to at Close. This Report from tie provides information across a number of key areas. A parallel report from DLA covers the content of the Infraco contract suite including the legal underpinning to the final contract positions, addressing specific CEC concerns. The DLA Report is a separate document in order to protect the legal advice offered to tie and CEC. Specific issues of interest to CEC are addressed in each document.

A reasonable degree of prior knowledge is assumed. A draft version was reviewed at the meetings of the TPB, tie Board and TEL Board on 23rd January 2008 and the approvals below were granted on that date. The delegated structure has been implemented.

It is understood that the Council will prepare appropriate papers for its own approval purposes, specifically to support the provision of delegated authority to the tie Executive Chairman to execute the contracts. The Council will also require to confirm its approval of the Grant Award Letter and the Financial Guarantee in addition to the contracts which will be entered into by tie.

TPB	approval of terms of Infraco and all related documents including note of main open areas, recommendation to TEL on those terms and on the proposed delegated authority to approve and sign ; approval of governance and delegation paper
TEL	approval of terms of Infraco and all related documents including note of main open areas, recommendation to Council on those terms and the proposed delegated authority to approve and sign ; acknowledgment of terms which will be assigned to TEL in due course ; approval of the TEL Operating Agreement and; approval of governance and delegation paper
Tie	approval of terms of Infraco and all related documents as basis for commitment, including note of main open areas; acknowledgement of the proposed delegated authority to approve and sign ; approval of the tie Operating Agreement ; approval of governance and delegation paper

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Report Contents

(1) Introduction

The significant stages in the project to date include :

April 2003	Ministerial approval of initial Business Case and grant award
December 2003	Finalisation of STAG and submission of Bills to Parliament
May 2004	Commencement of early operator involvement with Transdev
October 2005	Commencement of design work under SDS
April / May 2006	Royal Assent to Tram Bills
April 2007	Commencement of utility diversion work under MUDFA
May / June 2007	Change of government and re-confirmation of project
October 2007	OGC Gateway 3 Review
October 2007	Final Business Case for fully integrated system approved by CEC
December 2007	Resolutions to proceed approved by CEC
March 2008	Financial Close – construction and vehicle supply

Although there have been several key events, the completion of the contract suite which commits delivery of the system is highly significant in terms of the scale of commitment and the definitive nature of the programme to complete the project.

To reach this stage has involved close collaboration over a number of years between tie, TEL and the Council along with principal consulting and contractual partners. Throughout, progress has been monitored by the Project Board and the tie and TEL Boards, with full Council approval at key stages. Until mid-2007, Transport Scotland (and predecessor departments) played an active role in the project, since then a more arms length role has been played but crucially this has supported the commitment to the majority of the funding.

The balance of this report summarises the main features of the project and its supporting documentation as a basis to assess readiness for commitment. More detailed information is available on every aspect on request.

(2) Infraco contract suite

The DLA Report provides extensive commentary on the development and final content of the Infraco Contract Suite.

The narrative below addresses two specific areas :

2.1 Summary Pricing Statement – Infraco and Tramco

Appendix 3 provides a summary of the total Infraco and Tramco contract cost and a tie-in to the total project budget.

2.2 Summary of Programme – Infraco and Tramco

The critical milestones are :

Contract Award	March 2008
Commence on site (demolitions)	April 2008
Commence on Street Works	August 2008
Commence Princes Street Blockade	January 2009
Decision on 1b	By March 2009
Take Delivery of 1st Tram	December 2009
Complete Depot & Test Track	March 2010
TRO made	Autumn 2010
Construction substantially complete	January 2011
Commence Shadow running	February 2011
Edinburgh Tram Line 1a Open for Revenue Service	July 2011
Line 1b Open for Revenue Service (if instructed)	January 2012

This programme has been developed around key assumptions and constraints such as:

- Operation within Construction Code of Practice working hours
- Compliance with embargoes affecting key city centre and Forth Ports areas
- Design and approvals early start constraints
- MUDFA diversion early start constraints
- Critical BBS skill resource constraints (e.g. track welders / Overhead line staff)

The most significant of these are outlined below:

<u>Design and Approvals relationship with INFRACO Construction Programme</u>

The SDS design and approvals programme (including CEC and other 3rd Party approvals e.g. Network Rail) has been used during the development of, and to agree, the INFRACO Programme.

There are a number of areas where the Design and Approvals Programme is the early start constraint for INFRACO, principal amongst these are:

- Section 1A: Forth Ports area
- Section 2A: Haymarket Viaduct
- Section 5A Structures at Roseburn / Murrayfield
- Section 5B Balgreen Road
- Section 5C A8 underpass
- Section 6 Depot
- Section 7A Gogarburn Structures

Sections which link to the critical path within 1 month are:

Section 1A: Forth Ports area
Section 5A Structures at Roseburn / Murrayfield
Section 5C A8 underpass
Section 6 Depot

<u>MUDFA relationship with INFRACO Construction Programme</u>

The MUDFA Rev06 programme has been used during the development of and to agree the INFRACO Programme.

There are a number of areas where MUDFA is the early start constraint for Infraco, principal amongst these are:

- Section 7B: Critical Airport diversions
- Section 6: Depot
- Section 5C: A8 underpass sewer diversion
- Section 2A: Haymarket Junction
- Section 1C: Princes Street, Picardy Place and St Andrews Square
- Section 1A Ocean Terminal – Newhaven & Ocean Drive at Victoria Bridge

The sections which link to the Construction Critical Path within 1 month are:

Section 7B: Critical Airport diversions
Section 6 Depot
Section 2A: Haymarket Junction
Section 1C: Princes Street, Picardy Place and St Andrews Square

TRAMCO relationship with INFRACO Programme

The TRAMCO design, manufacture, testing and commissioning programme has been used during the development of the INFRACO programme.

Sections which link to the revenue service critical path within 1 month are:

[To be Confirmed]

(3) Grant Award Letter

Transport Scotland will provide up to £500m of the total capital cost and the balance will be provided by CEC, which has initially allocated £45m for this purpose. The source of these funds is a matter for the two funders. The Government grant is documented in an award letter which is specific to the project but follows standard terms for grants under S70 of Transport (Scotland) Act 2001. CEC has identified a range of sources and an independent review confirmed the validity of the assumptions made by the Council.

The programme concentrates on Phase 1a initially and the parties have the opportunity to commit to Phase 1b before 31 March 2009 on pre-agreed terms with BBS. During 2008-9, an assessment will be made of funding availability to support Phase 1b. Government contribution will not exceed £500m under the current arrangements.

Grant will be drawn down pro rata with Council contribution. The amounts of grant available in each financial year will be capped, with the balance of any undrawn grant added to the sum available in 2010-11. There are detailed arrangements for payment approval and audit.

With the contributions agreed, the pro rata drawdown mechanism becomes an accounting process each month and within tolerances will not create any difficulty. The annual capping does have potential to create difficulty, but it is felt there is sufficient tolerance in the spend plans versus funding availability that this limitation is manageable.

The terms of the grant letter are weighted in favour of the awarding body and fall short of the sort of protection which a borrower would seek from a commercial lending bank. This is however normal and the Council are satisfied that the terms of the award offer sufficient protection bearing in mind the relationship between Government and the Council.

The letter was negotiated with TS by tie and Council Finance and Legal officials with comment from DLA. See Section 7 for taxation assessment.

(4) Notification of Award, challenge process and cooling-off period

This section contributed by Jim McEwan, who performed a review of procurement process integrity independent of the main procurement team.

<u>Summary</u>

Over the last 12 months tie has pursued the procurement of both the Infraco contract for the construction of the Tram infrastructure in its entirety and the Tramco contract for the supply and delivery of the Tram vehicles. The focus of the procurement strategy was to deliver fixed price contracts for each.

The process followed for each contract was consistent with that specified by the EU directive on Public procurement and details of the evaluation methodology employed are outlined below.

The Bilfinger Berger and Siemens (BBS) consortium have been duly awarded the Infraco contract.

CAF has been awarded the Tramco contract.

In the event of any challenge to these awards tie is well placed to successfully defend the fairness and integrity of the process undertaken in the selection.

<u>Infraco</u>

The Evaluation Methodology employed by tie in the Tram Project is detailed in a document dated 8th January 2007 'Evaluation Methodology for submissions in response to the invitation to negotiate issued on 3rd October 2006 for the procurement of the Infraco for Edinburgh Tram Network' .

In the process 6 key areas were identified in the evaluation and a stream leader appointed to each :

Financial
Programme and Project Execution Proposals
Project Team and Resources
Technical and Design proposals
Legal and Commercial
Insurance

Evaluation team members were identified in the methodology together with stream leaders for each of the key areas

Each team was charged to prepare a 'consensus' score matrix on each of the key areas, these have been duly completed and lodged in the central document repository.

Proper probity on the process was maintained with financial information being restricted to only those in the finance stream and to the tie executive team.

Security employed on maintaining confidentiality was consistent with best practice with documentation stored in a locked room and the financial documentation stored in a locked cabinet within the room. (Note: The details of the financial bids were only available to those in the Financial stream, the evaluation of the other streams was therefore carried out without prejudice on costs.)

All meetings with Suppliers were documented and the notes of said proceedings are held in the central repository.

Financial position was reviewed as was the normalisation process which ensures bids are viewed on an equal footing basis

Tramco

The Evaluation Methodology employed by tie in the Tram Project is detailed in a document dated 11th October 2006 and titled Tramco Evaluation Methodology.

The process employed was identical to that employed in the Infraco evaluation as detailed above with 6 streams and the same methods of approach on scoring, confidentiality, probity and security. All required documents have been lodged in the central document repository.

(5) Third Party Agreements

This section contributed by Alasdair Sim, who took the lead role developing the agreements. A second (and consistent) view on risk is provided by Stewart McGarrity in Section 9.

In addition to the principal Infraco Contract Suite, there are a number of agreements which are of varying significance to Financial Close. This section describes the purpose and status of these agreements, together with an assessment of the level of risk to programme / cost arising from the agreements remaining open at the date of Financial Close.

THE AGREEMENTS ASTERISKED ARE REGARDED AS THE MOST IMPORTANT IN RELATION TO REACHING A ROBUST POSITION AS AT FINANCIAL CLOSE.

The agreements addressed in this section are as follows :

5.1 Edinburgh Airport Limited - Licence *
5.2 Edinburgh Airport Limited – Lease *
5.3 Edinburgh Airport Limited – Operating Agreement
5.4 CEC/tie Licence *
5.5 SRU Side Agreement
5.6 Royal Bank of Scotland Agreement
5.7 Local Code of Construction Practice – Forth Ports *
5.8 Local Code of Construction Practice – New Edinburgh Limited *
5.9 Local Code of Construction Practice – Edinburgh Airport *
5.10 Network Rail Asset Protection Agreement *
5.11 Network Rail Depot Change *
5.12 Network Rail Station Change *
5.13 Car Park Compensation Agreements
5.14 Network Rail Framework Agreement *
5.15 Network Rail Lease & Servitude Agreements
5.16 Forth Ports Agreement
5.17 Stanley Casinos Agreement
5.18 Other Site Specific Code of Construction Plans
5.19 Licence – The Gyle
5.20 Licence – West Craigs
5.21 Network Rail – Neighbour Agreement
5.22 Network Rail – Operating Agreement
5.23 Network Rail – Bridge & Bridge Lease Agreements
5.24 Telewest utility agreement
5.25 Scottish Power utility agreement
5.26 DPOFA 2007 Revision
5.27 Mobilisation agreements (Infraco and Tramco)

5.1 Edinburgh Airport Limited - Licence *

Purpose of Agreement
This is a licence agreement between Edinburgh Airport Ltd and City of Edinburgh Council, the purpose of which is to enable/facilitate the construction of the Edinburgh Tram within the boundary of Edinburgh Airport. This agreement covers MUDFA and INFRACO works as well as the construction of the Burnside Road alternative access route, and sets out the working arrangements between EAL, tie/CEC and contractors working on the Edinburgh Tram Network.

Current Status of Agreement
The agreement is signed. This agreement has been drawn down into Schedule 13 of the INFRACO Contract.

5.2 Edinburgh Airport Limited – Lease *

Purpose of Agreement
This is a 175 year lease between Edinburgh Airport Limited and City of Edinburgh Council to facilitate the operation of the Edinburgh Tram Network. This lease follows the terms of the Minute of Agreement signed by the two parties during the Parliamentary process in September 2005.

Current Status of Agreement
This agreement is signed.

5.3 Edinburgh Airport Limited – Operating Agreement

Purpose of Agreement
The purpose of the operating agreement is to set out operational interface arrangements and procedures for running passenger services to and from the airport. This agreement will be an evolving document which will be updated periodically during the lifetime of the project.

Current Status of Agreement
An outline document is current under review by tie and TEL. The intention is to develop this document into draft agreement form during the first quarter of 2008, and complete the agreement prior to commencement of passenger services.

Risk to INFRACO Contract Award
The Operating Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

5.4 CEC/tie Licence *

Purpose of Agreement
The purpose of this licence is to pass over responsibility for land acquired for the ETN from CEC to tie. This will enable tie to manage the process of making land available to INFRACO on a programme/needs basis using the agreed Land Access Permit Procedure. CEC will manage the land/asset until the point that INFRACO take occupation of each worksite.

Current Status of Agreement
The agreement is signed.

5.5 SRU Side Agreement

Purpose of Agreement
This agreement governs design and construction activities in the vicinity of the Murrayfield Stadium. The agreement includes the construction of the Murrayfield Tram Stop, Roseburn Street Viaduct, Murrayfield Retaining Wall, the Wanderers Clubhouse remodelling and the relocation of the training pitches. The agreement also sets out the requirement to develop a local construction plan which the INFRACO contractor will be obliged to comply with. This will also include arrangements in relation to the temporary occupation of land within the Murrayfield site. The draft SRU agreement has been stepped down into Schedule 13 of the INFRACO Contract.

Current Status of Agreement
[To update]

Risk to INFRACO Contract Award
INFRACO works are expected to commence in the vicinity of Murrayfield in August 2008. Risk to award of INFRACO Contract is considered low.

5.6 Royal Bank of Scotland Agreement

Purpose of Agreement
This agreement builds upon the existing Section 75 Agreement between RBS and CEC which sets out the funding arrangements for the Gogarburn Tram Stop. The current proposal is for the INFRACO contractor to undertake the works within RBS land under licence, and sets out the procedure for CEC to later acquire the operational land based on the 'as built' (and at nil cost) using the GVD process. The agreement also covers the desire of RBS to maintain the landscaping between the Gogarburn Tram Stop and the A8 Glasgow Road.

Current Status of Agreement
The agreement is currently in draft format, with finalisation expected on completion of the detail design, as this will allow final costs for the tram stop to be calculated. RBS have provided written confirmation that access to the land will be secured under licence.

Risk to INFRACO Contract Award
INFRACO works are expected to commence in the vicinity of Gogarburn from June 2008. Risk to award of INFRACO Contract is considered low.

5.7 Local Code of Construction Practice – Forth Ports *

Purpose of Document
The existing Minute of Agreement between Forth Ports and CEC requires the development of a Local Code of Construction Plan to govern how the construction

works are to be undertaken within the Forth Ports area. This would include method statements, programme details and consultation/notification requirements to be agreed prior to the commencement of construction. The Forth Ports Minute of agreement is included with Schedule 13 of the INFRACO Contract.

Current Status of Document
tie and BBS are currently drafting a local COCP with Forth Ports and have reached agreement with Forth Ports on the general approach to construction in the Leith Docks area. tie meet with the Forth Ports Project Manager on a weekly basis and will continue to evolve the local construction plan as certainty on programme is established.

Risk to INFRACO Contract Award
INFRACO works are expected to commence in the Forth Ports area from June 2008. MUDFA works will recommence in the Leith Docks area following the Easter embargo period from April 2008, and is currently being undertaken on a work by works licence basis, which contains the relevant elements that INFRACO will include within the final Local Code of Construction Practice document.

Forth Ports, tie and BBS have been undertaking preliminary discussions around programme and approach to construction. Forth Ports have expressed a willingness to work with BBS to have the works completed in the Leith Docks area as quickly and seamlessly as possible. As a result, the risk to award of INFRACO Contract is considered low.

5.8 Local Code of Construction Practice – New Edinburgh Limited *

Purpose of Document
The existing Minute of Agreement between New Edinburgh Ltd and CEC requires the development of a Local Code of Construction Plan to govern how the construction works are to be undertaken within Edinburgh Park. This would include method statements, programme details and consultation/notification requirements to be agreed prior to the commencement of construction.

Current Status of Document
tie and BBS are currently drafting a local COCP for Edinburgh Park and have consulted with Edinburgh Park Management Ltd and New Edinburgh Ltd on programme and approach to construction. NEL have confirmed in writing their acceptance if the construction programme.

Risk to INFRACO Contract Award
INFRACO works (track) are expected to commence in Edinburgh Park from June 2008, with construction of the Edinburgh Park Station Bridge commencing in August 2008. NEL have confirmed their acceptance of the programme and as a result, risk to award of INFRACO Contract is considered minimal.

5.9 Local Code of Construction Practice – Edinburgh Airport *

Purpose of Document
The licence between EAL and CEC sets out construction requirements in Schedule Part 5 – Development Rights and Obligations. This agreement has been drawn down into Schedule 13 of the INFRACO Contract.

Current Status of Document
tie and BBS are currently drafting a local COCP based on the obligations set out in Schedule Part 5 of the EAL Licence Agreement. tie meet with the EAL Project Manager on a four weekly basis and are currently working with EAL to ensure that tram construction activities integrate with other works ongoing within the Airport. EAL are content with the approach and tie/BBS will continue to evolve the local construction plan as certainty on programme is established

Risk to INFRACO Contract Award
MUDFA programme within Airport expected to commence on 30 March 2008; INFRACO works are expected to commence in September 2008. Positive engagement between EAL and BBS is ongoing and as a result, risk to award of INFRACO Contract is considered low.

Network Rail (NR) agreements – general

The suite of NR agreements comprises the following :

- Asset Protection Agreement
- Station & Depot Change (NR with the Train Operating Companies)
- Framework Agreement
- Lease and Servitude Agreements
- Neighbour Agreement
- Bridge Agreement and Lease
- Lift & Shift Agreement
- Immunisation

5.10 Network Rail Asset Protection Agreement *

Purpose of the Agreement
The APA is an agreement between NR and CEC which governs design/construction activities as well as access to Network Rail land. The APA is designed to ensure that the heavy rail network can operate in tandem with the construction and commissioning of the ETN.

Current Status of Agreement
The APA was signed by Network Rail on 11 March 2008.

Risk to INFRACO Contract Award
The APA has been signed which allows INFRACO to undertake works on NR land, the risk to INFRACO award is therefore considered low.

Additional comment provided by DLA

The Asset Protection Agreement has been negotiated exhaustively with Network Rail over a period in excess of one year. The outcome is a document which achieves significant commercial improvements for tie/CEC on what was originally offered by Network Rail. The arrangement is nevertheless heavily tilted in Network Rail's favour, as is inevitable given the starting point of the biased regulatory template agreements. The main improvements secured have been:

- Significant widening of the circumstances in which tie can recover money from Network Rail;
- Reasonableness in Network Rail actions and ability to refer to the Infraco ETN Suite form of Dispute Resolution Procedure;
- Dilution of indemnities given by tie to Network Rail to a mutually acceptable level.

The unreasonable position taken by Network Rail regarding the indemnities contained in the Protection Provisions Agreements (entered into to remove Network Rail's objection to the tram scheme) delayed closure for a considerable time. This has now been resolved to restrict the scope and duration of this indemnity, particularly during construction.

The property aspects of the ETN-NR post construction interface have been handled by Dundas & Wilson.

5.11 Network Rail Depot Change *

Purpose of Document
This is a regulated process between Network Rail and First ScotRail, the operator of the Haymarket Light Maintenance Depot. Depot change is the process which defines the revised lease arrangements which will be required as a result of the tram construction and operation. This procedure also defines the methodology of undertaking works in the vicinity of the Haymarket Depot and sets out the interface requirements of the Depot Manager. A key requirement of FSR is that only one contractor (at a single work site) will be permitted to conduct works within the depot area at any given time. BBS are aware of this constraint, and have sequenced their programme and depot construction methodologies accordingly.

Current Status of Document
The formal submission of the Depot Change (by NR) to FSR was completed on 11/01/08. The regulated process allows for a maximum review period of 45 calendar days for comments to be submitted. FRS notified NR on 04/03/08 of their acceptance of the Depot Change proposal.

Risk to INFRACO Contract Award

INFRACO works at Haymarket Depot are scheduled for commencement after completion of the NR Pollution Prevention Works Contract (PPLMD). tie, BBS and NR are currently working to integrate the two programmes in order to minimise the risk of delay to

INFRACO. At present, NR expect the PPMLD works to be completed at the end of September 2008, with INFRACO works scheduled to commence on the Roseburn Street Viaduct in January 2009.

The Risk to award of INFRACO Contract is therefore considered low.

5.12 Network Rail Station Change *

Purpose of Document
This is a regulated process between Network Rail and First ScotRail as the operator of Haymarket Station. The Station Change procedure also requires the consent of the other Train Operating Companies (TOC's) using the station and these are; Arriva Cross Country, Virgin, Trans Pennine Express, National Express East Coast and EWC.

The station change concerns the permanent loss of 49 parking spaces at Haymarket Station Car Park and the temporary closure of the car park as a result of the construction of the Haymarket Viaduct and Tram Stop, as well as the relocation of taxis currently operating from the forecourt of station.

Current Status of Document
NR formally submitted the Station Change proposal to FSR on 16/01/08, which triggers the start of the 45 calendar day consultation process which ends on 01/03/08. FRS notified NR on 04/03/08 of their acceptance of the Station Change proposal.

Risk to INFRACO Contract Award
As the Station Change proposal has been accepted by FSR and the other train operating companies who use Haymarket Station, the Risk to award of INFRACO Contract is considered minimal.

5.13 Car Park Compensation Agreements

Purpose of Document
The loss of income generating cark park spaces at Haymarket Station is a compensation matter for both NR and FSR. Under Station Change, FRS receives a standard indemnity from Network Rail to cover losses, so the commercial arrangements can be negotiated separately and do not form part of the Station Change approval process.

Current Status of Document
tie are awaiting FSR to provide a date to commence these discussions, and FSR have confirmed that the compensation formulae adopted for the Platform Zero settlement can be used as a basis for this negotiation.

Risk to INFRACO Contract Award
The compensation settlement to both NR and FSR are commercial arrangements which have a budget allocation within the FBC and are not part of the Station Change approval process. There is therefore minimal risk to the award of the INFRACO contract.

5.14 Network Rail Framework Agreement *

Purpose of Agreement
This is an overarching document beneath which reside a suite of construction, property and operations related agreements.

Current Status of Agreement
The Framework agreement was signed by Network Rail on 11/03/08.

Risk to INFRACO Contract Award
The Framework Agreement has been signed, but as this is not a construction related document, so the Risk to award of INFRACO Contract is insignificant.

5.15 Network Rail Lease Agreements & Servitudes

Purpose of Document
Two leases are proposed, the first; with NR as landlord is a 175 year lease to allow operation of the ETN on NR owned land. The second lease is with CEC as landlord and allows NR to use the relocated car park at Haymarket Depot. The servitude agreements for Balgreen Road and Haymarket Station allow NR rights of access to the railway and NR owned infrastructure over CEC owned land.

Current Status of the Agreements
The documents are in agreed and final form. The tram lease does not become active until after construction and commissioning have been completed, and is suspensive on the execution of an Operating Agreement with Network Rail.

Risk to INFRACO Contract Award
These documents are not construction related, so the Risk to award of INFRACO Contract is insignificant.

5.16 Forth Ports Agreement

Purpose of Agreement
A variation of the existing Minute of Agreement between CEC and Forth Ports is currently in draft. This agreement is based around changes to the design in the Leith Docks area, which will be funded by Forth Ports.

Current Status of Agreements
Heads of Terms have been agreed and signed by CEC and Forth Ports. The variation agreement has been sent for execution by Forth Ports on 11/03/08.

The transfer of land from Forth Ports to CEC will be part of the FP contribution to the project, and this is part of the existing Section 75 agreement.

Risk to INFRACO Contract Award
There is no risk to award of the INFRACO Contract.

5.17 Stanley Casinos Agreement

The Stanley Casinos side agreement is also design dependant, and takes cognisance of the revised junction and access proposals at the Constitution Street/Ocean Drive junction. The agreement will also include provision for remodelling the Casino car Park. There is no risk to award of the INFRACO Contract.

5.18 Other Site Specific Code of Construction Plans

Purpose of Documents
As part of the suite of side agreements drawn down into Schedule 13 of the INFRACO Contract, there is a requirement in several agreements for the contractor to develop a local construction plan or CoCP as part of the notification/consultation process in advance of the works commencement. The relevant agreements are:

- USS
- Safeway/Morrisons
- Murrayfield Indoor Sports Club
- ADM Milling
- Ocean Terminal
- Royal Yacht Britannia
- Baird Drive Residents (Community Liaison Group undertaking)

Current Status of Documents
Tie and BBS have prepared a suite of drafts setting out the construction related requirements of the relevant side agreements.

It is notable that the construction requirements laid down in these side agreements generally relate to those aspects of site working such as confirmation of programme, maintenance of access during the works, pedestrian management, dealing with dust/noise, site cleanliness, reinstatement of property etc, that one would normally expect a competent contractor to be cognisant of.

Risk to INFRACO Contract Award
All relevant 3rd Party agreements are detailed within the INFRACO contract in Schedule 13. The requirements on Infraco are entirely in line with normal construction practice and the risk to CEC for award of the INFRACO contract is considered low.

5.19 Licence – The Gyle

Purpose of Document
The licence will allow the INFRACO contractor to undertake the works within Gyle owned land prior to permanent acquisition. In agreeing to undertake this work under licence, CEC will be able to meet the terms of the existing side agreement whereby permanent land take is to be minimised. At this stage in the design process, SDS cannot define with certainty the extent of the operational land. The proposal made to The Gyle is therefore to defer permanent acquisition until this certainty is available.

The acquisition of the 'as built' operational land will eliminate the risk of not meeting the obligations of the side agreement. The existing side agreement already makes provision for a licence to undertake works.

Current Status of Agreement
The Gyle have accepted the proposal to construct the works under licence. The licence is with CEC for approval at present.

Risk to INFRACO Contract Award
INFRACO works are expected to commence in the vicinity of The Gyle from June 2008. There is no risk to the award of the INFRACO contract.

5.20 Licence – West Craigs

Purpose of Document
The licence will allow the INFRACO contractor to undertake the works within West Craigs owned land prior to permanent acquisition. In agreeing to undertake this work under licence, CEC will be able to meet the terms of the existing side agreement whereby permanent land take is to be minimised. At this stage in the design process, SDS cannot define with certainty the extent of the operational land. The proposal made to West Craigs is therefore to defer permanent acquisition until this certainty is available.

The acquisition of the 'as built' operational land will eliminate the risk of not meeting the obligations of the side agreement. The existing side agreement already makes provision for a licence to undertake works.

Current Status of Agreement
A licence to construct the works has been agreed with West Craigs, the licence is currently with CEC for execution.

Risk to INFRACO Contract Award
INFRACO works are expected to commence on the proposed licence site from January 2009. There is no risk to award of the INFRACO contract.

5.21 Network Rail – Neighbour Agreement

Purpose of Agreement
This agreement sets out the ongoing relationship between CEC and Network Rail for managing the interface between tram lease land, NR operational land and other CEC land which is adjacent to the railway. The Neighbour Agreement will be updated as required over the period of lease.

Current Status of the Agreement
The neighbour agreement is in agreed and final form. Network Rail signed the document on 11/03/08.

Risk to INFRACO Contract Award
The Neighbour Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

5.22 Network Rail – Operating Agreement

Purpose of Agreement
The purpose of the operating agreement is to set out operational interface arrangements and procedures for running tram passenger services adjacent to the railway line. This agreement will be an evolving document which will be updated periodically during the lifetime of the project.

Current Status of Agreement
A draft is current under review by tie and TEL. The intention is to develop this document into draft agreement form during the first quarter of 2008, and complete the agreement prior to commencement of passenger services.

Risk to INFRACO Contract Award
The Operating Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

5.23 Network Rail – Bridge Agreement & Bridge Lease

Purpose of Agreement
The purpose of the Bridge Agreement and Bridge Lease is to allow operation of the ETN and set ongoing maintenance and operational responsibilities for the Carrick Knowe and Edinburgh Park Station Bridges, as these structures interface directly with the heavy rail network. The APA governs the construction of these bridges.

Current Status of Agreement
The framework agreement sets out that NR and CEC will work together, both acting reasonably, to develop a post construction Bridge Agreement. CEC will not be exposed to future network enhancement costs in relation to bridges.

Risk to INFRACO Contract Award
The Bridge Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

5.24 Telewest utility agreement

Purpose of Agreement
The purpose of the Agreement is to set out how the diversion of utilities owned by Telewest are to be managed during the MUDFA works.

Current Status of Agreement
The engrossed agreement has been sent to Telewest for signature.

Risk to INFRACO Contract Award
This is a MUDFA related agreement, and as a result it offers insignificant risk to CEC for award of the INFRACO Contract.

5.25 Scottish Power utility agreement

<u>Purpose of Agreement</u>
The purpose of the Agreement is to set out how the diversion of utilities owned by Scottish Power are to be managed during the MUDFA works.

<u>Current Status of Agreement</u>
The agreement is in agreed and final form, and the engrossed agreement will be sent to Scottish Power for signature before 14/03/08.

<u>Risk to INFRACO Contract Award</u>
This is a MUDFA related agreement, and as a result it offers insignificant risk to CEC for award of the INFRACO Contract.

5.26 DPOFA 2007 Revision

A negotiation was concluded with Transdev to amend the DPOFA signed in 2004. The process is now complete and the principal agreed changes relate to :

- Improved performance bond underpinning both mobilisation and operating obligations
- Alignment with Infraco contract where previous drafting was based on anticipated Infraco terms
- Scope revised to reflect the Phase 1a / 1b configuration from the originally anticipated Lines 1 and 2
- Revisals to KPI performance regime based on up to date commercial view.
- Replacement of original tram revenue incentive mechanism with a reduced cost recharge, reflecting a fully integrated bus and tram system
- Alignment of insurance arrangements under OCIP
- Obtained tram cost synergy savings with introduction of TEL being responsible for transport integration

5.27 Mobilisation agreements (Infraco and Tramco)

The pre-close mobilization agreements with Infraco and Tramco are designed to enable works necessary to maintain programme. The agreements are The Advance Works and Mobilisation Contract ("AWM") and Tram Advance Works Contract ("TAW").

The core of the AWM is that Infraco will perform a schedule of works with payment determined by "Agreed Element Estimates" agreed by the parties in respect of each element of work.

The AWM does not overlap with the Infraco Contract because, when the Infraco Contract is entered into, the AWM automatically terminates. The Infraco Contract therefore deals with payment and other terms relating to advance works underway at that time. The AWM also states that it terminates if the Infraco Contract is not entered into by 31 March and an extention will therefore need to be agreed if required. The TAW works similarly, in that it ends automatically when the Tram Supply Agreement is entered into. Again, the deadline for this to occur is 31 March subject to agreed extention.

(6) Land acquisition arrangements

Purpose of process

The process of assembling land required for the construction and operation of the Edinburgh Tram Network has been managed using a combination of Compulsory Purchase (using the General Vesting Declaration Procedure), and entering into long term lease arrangements with Network Rail and Edinburgh Airport Limited.

Current Status of Agreement

By financial close, the position in regard to Land available to INFRACO is as follows:

Nature Of Land	Land Area (sqm)	Available to INFRACO	Land Take Achieved	Target Date	No Plots
Pre GVD	498	Yes	0.1%	Nov-05	3
GVD 1&2	177467	Yes	21.0%	Feb-07	43
GVD 3	167854	Yes	19.9%	Jul-07	22
GVD4	43323	Yes	5.1%	Sep-07	19
GVD5	2381	Yes	0.3%	Dec-07	5
GVD6	83588	Yes	9.9%	Dec-07	17
Licences	24885	Yes	2.9%	Jan-08	14
BAA Licence	18388	Yes	2.2%	Nov-07	17
NR APA	42480	See above	5.0%	Feb-08	37
Forth Ports (S75)	80293	Yes	9.5%	Mar-08	51
Adopted Roads	202521	Yes	24.0%	Achieved	78
	843679		100.0%	Total	306

Of the total land required, 85.5 % is under the control of CEC through ownership or license, a further 9.5% is committed under Forth Ports existing S75 agreement with the balance of 5% subject to the Network Rail APA agreement discussed above.

(7) Governance & corporate arrangements

7.1 Governance & delegations

The Governance model deployed to oversee and control the project has evolved as the project itself has moved through different stages of development. Appendix 4 is a detailed paper which was approved by the Boards on 23rd January. The paper sets out :

1) the proposed governance model for the construction period ; and
2) the proposed levels of delegated authority

The paper is an update of previous submissions to the Boards and differs only in two material respects – the inclusion of specific levels of delegated authority and alignment with the terms of the tie and TEL Operating Agreements (see below). Neither of these factors should cause concern : the levels of delegated authority are in line with those previously deployed by the TPB and the terms of the operating agreements have been subject to significant scrutiny by senior people over recent months.

7.2 Operating agreements

These agreements are now in final agreed form and are attached at Appendices 5 and 6.

tie
The tie agreement was previously reviewed by the tie Board in December 2007 and the changes since then are in line with the request made by the tie Board. The tie agreement supercedes the existing agreement and sets out tie and the Council's mutual responsibilities for delivering the tram project.

TEL
The TEL agreement reflects TEL's role but the detailed wording is consistent with the tie agreement. The TEL agreement sets out the specific authority delegated to it by the Council with acknowledgement that TEL will sub-delegate its authority to the TPB.

These internal agreements have been settled, where possible, taking account of DLA Piper's advice to tie and CEC in relation to (i) their acceptability as evidence of agency authority to transact and (ii) their potential adverse impact on the project's strategy towards competition law.

7.3 Taxation

Advice has been taken from PwC on two principle areas :
1) The tax effect of the Infraco contract suite structure ; and
2) The VAT status of the grant funding

The main objective in tax planning has been to ensure that the arrangements were VAT neutral such that there would be no irrecoverable input VAT and that no unforeseen output VAT would require to be accounted for. We have a formal report from PwC addressed to tie, CEC and TEL confirming this. We have also engaged with HMRC and have a clearance letter from them confirming that the objective is achieved.

The contract structure has also been assessed by PwC to ensure that it will be possible in due course to establish a cost base in TEL by either selling or leasing system assets owned by CEC which will create corporation tax shelter in TEL. This could prove very valuable over the operating period of the integrated system.

(8) Risk assessment of in-process and provisional arrangements

This section contributed by Stewart McGarrity, who reviewed those areas of the documents which are provisional in nature and the documents which will be in draft form at Close.

THE MATERIAL IN THIS SECTION IS COMMERCIALLY CONFIDENTIAL AND FOISA EXEMPT.

8.1 Overview

tie's approach to identifying and managing risks was fully explained in the Final Business Case. This section reviews the current status of the risks relating to the Infraco and Tramco contracts which have been identified as wholly or partly retained by the public sector beyond Financial Close which are:

- The process for granting of approvals and consents;
- The process for granting of permanent TRO's
- The interface with the implementation of utility diversion works
- Delays to design approvals for reasons outside the control of the Infraco
- Stakeholder instructed design changes

Specific areas covered are:

- Price certainty achieved through the Infraco and Tramco contracts with a view on items included in the contract price which will remain provisional at Financial Close
- Specific exclusions from the Infraco contract price
- Responsibility for consents and approvals

And as an area of particular concern to stakeholders:

- The risks associated with significant 3rd Party Agreements not concluded in full at Financial Close.

8.2 Price certainty achieved

The Tramco price agreed at £54.7m is a fixed sum in pounds sterling for the supply of trams. The overall capital costs estimate for Tramco also includes a fixed sum of £2.3m for mobilisation costs associated with the maintenance contract and to be paid prior to the commencement of operations.

The Infraco price of £231.1m comprises
- £234.7m of firm costs
- less £13.8m of Value Engineering initiatives taken into the price with the agreement of BBS but with qualifications attached
- plus £10.2m of items which remain provisional at Financial Close.

A thorough risk appraisal has been carried out on the deliverability of the Value Engineering initiatives with reference to the qualifications which attach to them. As a result a prudent allowance of £4m has been made against the possibility that for certain items these qualifications will not be removed (of which £2m has been included in the base cost estimate for Infraco and £2m has been included in the overall risk Allowance for the project).

Provisional items comprise a defined list of 13 Items each with a clear process for and programme for resolution. The estimate for each item has been reviewed by tie's technical consultants and by BBS and the risk of understatement is considered to be low. The most significant item is a £6.3m allowance for civil works, including utilities, at Picardy Place as the design for the approved layout is not yet complete. The cost of the actual tramway, tram stop and associated works at Picardy Place are included in the firm element of the price.

The overall capital cost estimate for Infraco includes a further £3.4m comprising £1.4m for maintenance mobilisation (as for Tramco), £1m for major spare parts based upon a schedule of prices provided by Infraco and a £1m provision for known design changes at the Airport tram stop where the change are yet to be included in the design which formed the basis of the Infraco price.

8.3 Infraco price basis and exclusions

Appendix 7 provides a detailed analysis of exclusions.

The Infraco price is based upon the Employers Requirements which have been in turn subject to thorough quality assurance and the significant areas where post contract alignment of the SDS design will be required. Crucially the price includes for normal design development (through to the completion of the consents and approvals process – see below) meaning the evolution of design to construction stage and excluding changes if design principle shape form and outline specification as per the Employers Requirements. The responsibility for consents and approvals is further considered below.

Significant exclusions from the Infraco price are items not included in the Employers Requirements in respect of (responsibility for securing incremental sources of funding in brackets):

- Additional works at Picardy Place, London Road and York place (CEC)
- Additional works at Bernard Street (CEC)
- Full footway reconstruction in Leith Walk (CEC)
- Additional works in St Andrew Square outwith the tram alignment (CEC)
- Changes within the Forth Ports area (Forth Ports)
- Any other scope required by third parties not already included in the Employers Requirements by virtue of a commitment in an existing agreement

8.4 Responsibility for consents and approvals

As previously tie/CEC will retain the risk associated with the process of obtaining TROs and TTROs (some for TTROs post-Service Commencement which are Infraco's responsibility). Full provision has been made in the Risk Allowance for the possible costs associated with a legal challenge to the TRO process which it is not anticipated will include a formal pubic hearing.

As fully detailed in Appendix 1, for all other required consents and approvals (either design or construction related) the principles which apply are:

1. Infraco (including SDS) will bear any costs and programme consequences associated with design quality and constructability for all consented and/or approved design.
2. in respect of consents and approvals outstanding at Financial Close, tie/CEC will bear any incremental construction programme cost consequences of SDS failure to deliver design outputs in a timely and sufficient manner to the consenting or approving authority insofar as the cost is not recoverable by Infraco from SDS under a capped liquidated damages provision or can otherwise be mitigated by the Infraco.
3. tie/CEC will bear the incremental cost and programme consequences associated with a delay in granting consents or approval having received the required information in a timely and sufficient manner and/or the cost and programme consequences of changes to design principle shape form and outline specification (as per the Employers Requirements) required to obtain the consent or approval.

Taking due cognisance of all mitigations described in Appendix 1, the Risk Allowance (see 10.6 below) includes provisions totalling £3.3m for delays associated with outstanding design work at Financial Close in addition to a £6.7m provision for general programme delay.

To clearly delineate responsibility and therefore risk allocation the Infraco contract and associated schedules, including the SDS Novation Agreement, clearly defines in detail and in a manner agreed by Infraco, SDS and tie/CEC:

- The necessary consents and approvals already obtained at Financial Close
- The remaining consents and approvals and whether the information to obtain such rests with Infraco or SDS
- The expectations with regard to quality of information including compliance with relevant law and regulation
- The programmed dates for delivering information and obtaining the necessary consents and approvals consistent with achieving the overall programme for the project

The role of tie in this complex process is to carefully manage the programme of delivery and take mitigating action as necessary to avoid any cost or programme implications from slippage on individual items. tie also retains responsibility for obtaining specific items including obtaining NR possessions which align with the construction programme agreed with Infraco.

The Risk Allowance does not provide for the cost or programme consequences associated with a wholesale failure of this process – see QRA alignment & Risk Allowance below.

8.5 3rd Party Agreements

The following italicised commentary has been provided by DLA :

The position achieved regarding Third Party commitments made by the ETN project is as follows:

(1) At ITN issue in October 2006, DLA Piper had included all major third party agreements tie had concluded at that time (plus SRU agreement in draft) in the so-called Schedule 13. This put Infraco on notice of the requirements to carry out work and/or observe constraints in these agreements. The inclusion of these agreements in the ITN documentation was carried out by DLA Piper without detailed tie instruction and that remains the case. That is to say the obligations selected for step down are DLA Piper's judgement, but not informed by any sectional engineering view from tie. The third party agreements - with the exception of the utilities divisions and Network Rail APA - were all prepared by Dundas & Wilson for CEC without DLA Piper's input.

(2) In addition to the Schedule 13 agreements (which has been updated to introduce one further agreement concluded since ITN issue date), tie had entered into a range of commitments with private individuals and smaller businesses during the parliamentary phase and beyond. Following preferred bidder appointment, BBS took the position that they had never been shown or given access to these papers (contained on two CDs). Whether this assertion is accurate or not, that is the qualification BBS held to with determination. This situation was negotiated strenuously by tie.

(3) BBS have accepted the contractual outcome that:

- *BBS must comply with the obligations set out in Schedule 13;*
- *BBS must not put tie/CEC in breach of (or in a position where it cannot use entitlement under) the Schedule 13 Agreements (which include, in essence, Network Rail APA and EAL Agreements);*
- *BBS undertakes to take all reasonable steps to ensure not to cause tie/CEC to be in breach of the CD commitments;*
- *if BBS is impaired by constraints/requirements in the CD commitments which are, in essence, unusual or could not reasonably have been foreseen by an experienced contractor, BBS will be entitled to apply for relief and any demonstrable additional cost*

SDS are contractually obliged to ensure that their design deliverables take account of all third party agreements and commitments and they are guaranteeing this to BBS under the Novation Agreement.

EAL

A number of issues have arisen from mismatches between the Licence agreed to permit construction activity at the airport under MUDFA and tie Infraco Contract and the terms of the pursuant lease negotiated with EAL. These are required to be corrected to remove risk and a Minute of Variation is under preparation.

A future risk is uncovered at present. The terms under which EAL is entitled to require the tramway to be shifted (post January 1, 2013) do not include an indemnity in relation to any defects or unforeseen interference in the ETN system which might result from this construction activity and its ultimate interface with the existing system. tie is assessing this.

SRU
This agreement is included in Schedule 13 in draft form but no pricing allowance is at present made for the Infraco executing the works.

All relevant agreements with 3rd parties form part of the Infraco contract (at schedule 13) and the Infraco price includes for the costs of any works and/or any construction constraints imposed by these agreements and as reflected in the Employers Requirements [Important issue still under debate with BBS].

[Comment to add on residual matters arising from third party agreements]

8.6 QRA and Risk Allowance

tie's risk identification and management procedures as detailed in the FBC describe a process whereby risks associated with the project which have not been transferred to the private sector are logged in the project Risk Register. Where possible the cost of these risks is quantified by a QRA in terms of a range of possible outcomes, probability of occurrence and thereby the Risk Allowance which is included in the capital cost estimate for the project.

The project Risk Register also details the "treatment plans" being followed to mitigate individual risks and thereby avoid all or part of the cost allowance.

As the Infraco and Tramco procurements have progressed tie has maintained and reviewed contractual Risk Allocation Matrices, which reflect the risks retained by the public sector arising from the contracts, and has exercised prudence in ensuring the Risk Register, QRA and therefore Risk allowance provide adequately for risks retained for the public sector including the major areas or risk assessed above.

The only material change in the Risk Allocation Matrices between Preferred Bidder stage and the position at Financial Close is in respect of the construction programme costs associated with any delay by SDS in delivery of remaining design submissions into the consents and approvals process beyond Financial Close.

The Project Control Budget at Financial Close totals £508m (Final Business Case £498m) including a risk allowance of £32m (Final Business Case £49m). This change primarily reflects the closure of procurement stage risks on Infraco and Tramco including all the risks associated with achieving price certainty and risk transfer to the public sector as has been effectively achieved in the Infraco contract as summarised above.

The risk allowance of £32m includes the following provisions for residual risks retained by the public sector during the construction phase of Infraco and Tramco.

- £8.8m in respect of specifically identified risks held by and to be managed by tie during the construction phase including adverse ground conditions, unidentified utilities and the interface with non-tram works and post close alignment of the Infraco proposals with the SDS design.
- £2m in respect of the risk that conditions attaching to the VE items taken into the Infraco price may not be removed
- £3.3m in respect of post Financial Close consents and approvals risks which provides for the cost or programme consequences of imperfections which may arise in elements of the consents and approval risk transfer as described above.
- £6.6m to provide for the cost of minor Infraco / Tramco programme slippage of up to 3 months (other than as a result of delays to MUDFA which is provided for elsewhere in the risk allowance).

tie has assessed these amounts as providing adequately for the residual risk retained by the public sector arising from the Infraco and Tramco works and the post Financial Close consents and approvals process. However the Risk Allowance does not provide for the costs of:

- Significant changes in scope from that defined in the Employers Requirements – whether such changes were to emerge from the consents and approvals process or otherwise
- Significant delays to the programme as a result of the consenting or approving authorities failing to adhere to the agreed programme (Infraco/SDS having met their own obligations) or any other tie/CEC initiated amendment to the construction programme which forms part of the Infraco contract.

All other things being equal any such changes falling into these categories would give rise to an increase in the cost estimate for Phase 1a of the project above of £508m.

8.7 Value Engineering Opportunities

As explained at 10.2 above, the Infraco price is stated after deducting VE opportunities with an aggregate value of £13.8m subject to satisfying certain conditions including the approvability certain items through the consents and approvals proves. A total of £4m have been provided against the possibility that such conditions will not be satisfied.

Value Engineering is a continuing process during construction and tie continue to seek to present value for money opportunities to save on construction and project management costs.

(9) Update on critical workstreams and readiness for construction

9.1 Design due diligence

The process and procedures laid out in the design management plan and design assurance process formal design reviews have been undertaken every week since September 2007 to inform and finalise the detailed design submissions. These submissions are then consolidated to form the necessary technical and prior approval packages for CEC to discharge their statutory obligations.

In parallel with the process since August 2007, BBS have had access to the detailed design submission across the range of asset for the Edinburgh Tram Network to enable Infraco's design due diligence to be undertaken. A formal report was received from BBS in February 2008 commenting on due diligence up to November 2007.

9.2 Run-time due diligence

The Infraco contractor is undertaking (has undertaken) modelling based on the updated data provided by SDS and CAF to accept the "laws of physics" runtime as part of the Employer's Requirements as well with Section 2.6 of the document.

9.3 TTRO / TRO process

[To follow]

9.4 MUDFA including interface with INFRACO programme

The Multi Utilities Diversion Framework Agreement [MUDFA] is currently being progressed to Programme Revision 06 as agreed in November 2007.

This programme has been utilised to integrate with the INFRACO programme (as attached at Appendix 3) and is identified as a constraint in a number of construction items. This has been reflected in the INFRACO Construction Programme with the agreement of BBS and other principal stakeholders as part of the sign up to overall construction methodology.

Specific elements of diversions have been transferred to INFRACO where it is required by construction sequencing for the final utilities works.
It is expected that, despite detailed subdivision of works to facilitiate BT cabling and commissioning, there will remain some overlapping of work sections as INFRACO commences. It is likely to be restricted to section 1C and 1B and can be managed with INFRACO, BT, AMIS and tie.

9.5 Management team and Handover

The Tram Project Team to manage the construction phase of the project has now been designed and is 80% populated. Interim arrangements are in place for all key posts where a permanent appointment is awaited.

Handover arrangements and detailed documentation of the final contract terms will be completed during March 2008. Key Procurement phase staff are contracted to remain until this handover is successfully completed.

The Infraco Director and team have commenced detailed works from February 2008 and are already managing and monitoring the Mobilisation Agreements with BBS and CAF.

In addition, 3rd party facilitation arrangements have been commissioned to accelerate the forming of effective working relationships between BBS and tie.

9.6 Safety

[To be updated for 11 March]

9.7 Commercial Management

tie have appointed their post-contract award Commercial Director, who commenced work on 7 January 2008. He is currently validating the necessary organisational changes and recruitment to ensure a competent, fully populated commercial team to manage the INFRACO contract (including novated contracts for SDS & TRAMCO) immediately.

Updated commercial processes and procedures are also being finalised and will be briefed and rolled out for Contract Commencement at the end of March 2008.

9.8 Insurance

[To be updated for 11 March]

9.9 Risk Management

tie's risk identification and management procedures as detailed in the FBC describe a process whereby risks associated with the project which have not been transferred to the private sector are logged in the project Risk Register. Where possible the cost of these risks is quantified by a QRA in terms of a range of possible outcomes, probability of occurrence and thereby the Risk Allowance which is included in the capital cost estimate for the project.

The project Risk Register also details the "treatment plans" being followed to mitigate individual risks and thereby avoid all or part of the cost allowance. There is an agreed risk management procedure currently in operation to manage and treat risks which is owned by tie's risk manager and subject to detailed scrutiny each period with the individual project managers at the period Project Director's Review.

tie and CEC have also agreed an interface to the project where a filter and review is applied to any risks raised by CEC which may be considered relevant as a project risk and requiring a necessary treatment plan.

tie are focused on managing the delivery risks and associated treatment and mitigation plans to avoid or minimise any cost, quality or programme implications.

(10) Specific confirmations

On the basis of the content of this report, the DLA Report and supporting documentation, it is considered that :

- **The Infraco Contract Suite is in terms acceptable for commitment ; and in particular**
  - **The Tramco Novation Agreement is in terms acceptable for commitment**
  - **The SDS Novation Agreement is in terms acceptable for commitment**
- **The CEC Financial Guarantee is in terms acceptable for commitment and is aligned in all material respects with the Infraco Contract Suite**
- **The tie Operating Agreement is in terms acceptable for commitment**
- **The TEL Operating Agreement is in terms acceptable for commitment**

APPENDIX 1

EDINBURGH TRAM PROJECT
SDS – DELIVERY AND CONSENT RISK MANAGEMENT DRAFT v3

This paper is in draft form as at 10th March 2008 and will be updated for any necessary changes up to Financial Close. This will apply to facts and judgements. The content of this draft is our current best estimate of how the final position will crystallise.

Background

Negotiations have taken place over a lengthy period of time with the objective of defining a process and set of contractual terms which will enable tie and CEC to manage the risks arising from the overlapping design and construction periods. This problem was not anticipated when the SDS contract was concluded in 2005. The recent discussions have taken place under the umbrella of the SDS Novation Agreement, but it is important to distinguish two groups of issues :

> Cost certainty : The primary objective of the novation approach was to ensure that design work could commence long before commitment to the construction contract suite generating maximum construction price certainty and transferring design risk to the construction partner.
> Outstanding design risk : SDS have resisted accepting liability to BBS for the timeliness of submission and approval of design packages after Financial Close. Their concern is that the risk is different from (and incremental to) the underlying risk arising from the quality of their work. A delay, they argue, could result in hefty exposure because of the linkage to construction programme delay. SDS did not anticipate this risk when committing to their contract - the expectation was that the majority of design scope and certainly all approvals would be complete prior to Financial Close.

The packages which have been delivered to BBS, with the requisite approvals, by Financial Close ("Approved Packages") are subject to the Novation terms, which inter alia result in BBS accepting the design quality risk, with resort to SDS in the event of failure under the terms of the existing SDS agreement. The exposure to SDS could be potentially onerous, but was accepted when they entered into the existing contract and is not currently contentious.

This means that the primary objective above of cost certainty and risk transfer has been achieved relative to Approved Packages.

The problem relates to design packages which as at Financial Close are either :

- Submitted for Prior / Technical Approval but not yet approved ("Submitted Packages") ; or
- Work in progress and not yet submitted ("Outstanding Packages").

The rest of this paper provides an analysis of the residual risk to tie / CEC arising from these two groups of design packages. The paper does not address so-called "tie Consents" – TROs, TTROs and consents relating to statutory authority to implement the scheme - which have been accepted as out with the responsibility of SDS and BBS, except that BBS (and through them SDS) have an agreed contractual responsibility to assist in the process.

Risk overview

The risks which arise from the overlap of design and construction periods are summarised below :

A. The Submitted packages are not of requisite standard, preventing CEC from providing consent timeously and creating delay to the construction programme.
B. The Submitted packages are of requisite standard, but CEC fail to provide consent timeously, creating delay to the construction programme.

C. SDS fail to provide the Outstanding packages on a timely basis relative to the agreed programme, preventing CEC from providing consent timeously and creating delay to the construction programme.
D. SDS fail to provide the Outstanding packages to the requisite standard, requiring rework and delay, preventing CEC from providing consent timeously and creating delay to the construction programme.
E. CEC provide consents and approvals timeously, but SDS then fails to provide IFC ("Issued For Construction") drawings to BBS timeously creating delay to the construction programme.
F. SDS provide the Outstanding packages on time and to the requisite standard, but CEC fail to provide consent timeously, creating delay to the construction programme.

It is not anticipated that the final Outstanding Packages will be delivered until Autumn 2008. The option of delaying Financial Close to eliminate the risk is therefore unattractive.

SDS has resisted accepting any liability in the event of any of these scenarios. Since the point of investing in a procurement of a design appointment in Autumn 2005 was to secure a completed approvals process with an advanced network design development, there was no allowance for the implications of a coincident design and construction process in the existing SDS agreement. Accordingly, tie / CEC's leverage over SDS on the issue is limited.

BBS have similarly resisted accepting any liability for the consequences of delay arising from the Submitted or Outstanding packages. Their position was reserved (as was Tramlines' position) at preferred bidder, pending due diligence on SDS, as they were aware of the issue at the Preferred Bidder stage, but again we have only limited sanction over them.

There has been no sustained attempt by BBS to sidestep the transfer of design quality risk once the Submitted and Outstanding packages are eventually signed over to them with consent. In fact they have now explicitly accepted the design quality risk as part of the Agreement made on Friday 7 March for Contract Price adjustment. Accordingly, the remaining risk is focussed on construction programme delay as a result of late delivery of design and hence IFC drawings impacting construction.

Resolving this issue has been made more difficult because of concern built up over a long period about the quality and timeliness of SDS's work on the part of tie, CEC and BBS.

There is also a concern that performance against the agreed submission programme could be obfuscated with the intent (or at least result) that design packages fall out with BBS / SDS responsibility because of claimed failure by CEC. This could happen in four ways:

1. Confusion about submission date if a package is returned by CEC for quality improvement
2. Swamping CEC with a high volume of design packages which cannot be processed within the 8-week period
3. BBS and SDS by some means acting in concert to subvert the process
4. Lack of clarity about the quality of submissions

In summary therefore, tie / CEC are exposed to risks relating to timeliness of submission and / or quality. The risk could be heightened by deliberate or inadvertent actions by BBS / SDS. The next section describes the primary means by which these risks can be contained, through an effective management process controlled by tie / CEC.

Development of the design submission and approval management process

Recent process improvements

The process of managing SDS has not been smooth. The performance of SDS has been consistently disappointing on a number of levels and it is fair to say that weaknesses have also existed in execution by tie and CEC.

More recently, building on the existing Tram and Roads Design Working Groups, a number of important initiatives have been implemented to improve all-round performance. These have together improved both the rate of design production and the quality of those designs.

(1) Co-location of staff
The co-location of tie, CEC and SDS staff in Citypoint shortened lines of communication and promoted a healthy working relationship that has led to quicker resolution of issues.

(2) Improved contract management arrangements
tie has increased the number and calibre of resource devoted to managing the design contract, strengthening both its capability to deal with engineering issues and to manage the overall relationship including commercial management and issues resolution.

(3) Focus on resolution of outstanding design issues
By instituting the weekly critical issues meeting with attendance from tie, CEC and SDS aimed at clearing critical issues so that they did not hold up design production, tie brought together the relevant individuals, assigned clear responsibility for securing resolution and monitored progress. In recent weeks that has resolved almost all issues that are holding up SDS design and allowed a number of designs that were almost complete to take the critical final step to full completion and submission for approval.

(4) Closing out third party agreements
Many of the outstanding design issues involved reaching final agreement with third parties. Although steady progress had been made with many third parties a small number of third party negotiations were not moving to a satisfactory conclusion. tie devoted additional resources to closing out these issues and worked closely with CEC and SDS to ensure final agreements were reached.

Documentation of process and execution

The management process is captured in the Design Management Plan ("DMP") This, along with the review procedure forms Schedule 14 of the Infraco Contract. In recent months, SDS has had much greater clarity over the reasonable expectations of the approvals bodies. All of SDS's design packages are clearly defined. A programme has been agreed for the submission of each and the quality of information to be provided with the submissions has been defined. In this context, "quality" relates to an objective assessment of the fitness for purpose of the package, not a subjective assessment of the aesthetic character of the content. A well-defined process of informal consultation prior to submission with relevant CEC people is in effective operation. Once submitted, CEC have an agreed period of 8 weeks to deliver Prior and / or Technical Approval as necessary ("consent") for each package.

Following novation of SDS to Infraco at Financial Close, tie will continue to use the DMP, working with CEC and InfraCo, to manage the design and consent process and maintain the improved performance in design production and approval. The DMP has been updated to incorporate the role of Infraco in managing SDS following novation but the key principles and initiatives remain in place. This process will be applied to complete the consent process for Submitted and Outstanding Packages as defined above.

tie is holding daily meetings with SDS and CEC to maintain the focus on delivery of individual Outstanding Packages and identify any problems early enough for them to be resolved with minimum impact on the programme. This will continue (also involving InfraCo) once the contract has been awarded.

CEC's involvement in the daily meeting ensures that there is timely and effective feedback from the approval body of progress with Submitted Packages. It also allows CEC to raise any issues that need to be resolved before a submission can be made.

Whilst some of the Outstanding Packages lie on the critical path for construction, many do not. This means that there is still some flexibility in the agreed approvals programme. Management of that flexibility lies with tie and CEC and BBS/SDS can only take advantage of the flexibility with tie's consent.

There will be some changes to the design that SDS submits/has already submitted. Mainly these are necessary refinement of the detail of items where the detailed design will be completed by BBS and these have been allowed for within the programme. Where BBS is proposing an alternative design to that already submitted by SDS, BBS will be responsible for securing approval of that alternative design. In these cases BBS will draw on the experience of SDS to manage that consultation and approval programme.

Contractual underpinning

The contractual terms which capture these arrangements reflect:

- The contractual responsibility for managing SDS design and development work supporting Submitted and Outstanding Packages sits with BBS;
- BBS are contractually obliged to follow the regime under the Review Process and Design Management Plan, as are SDS;
- SDS agree to liquidated damages to be applied by Infraco regarding late or deficient submissions to CEC;
- Contractual clarity as to primary responsibility for categories of Consents
- Excusable delay in failure to obtain CEC Consent entails evidence of full compliance by SDS/BBS with agreed regime: timing, sequence, quality, notification;
- The absolute nature of SDS contractual responsibility to obtain all Consents has been adjusted to reduce tension surrounding interface with CEC;
- The risk of prolongation cost as a result of SDS failings in terms of causing delay (through not obtaining Consent) is to be taken by tie.
- the risk to programme (and generally) of SDS consented design containing a quality deficiency is ultimately taken by SDS and, in the first instance, by BBS. BBS have now explicitly accepted this as part of the Contract Price. tie will hold a collateral warranty from SDS.

Finally and critically, the overall programme for consents is not only embedded in the SDS Novation agreement to which SDS and BBS are parties, but the programme has been interfaced in detail with the construction programme.

In summary, there is confidence among the tie and CEC managers involved that the management process can be executed rigorously after Financial Close.

Focussed risk analysis

In addition to executing effective management control across all design packages, it is useful to identify those packages which carry the greatest risk. This facilitates prioritisation and mitigation action and also creates a clearer view of the residual risk arising from the overlapping design consent and construction programmes.

On 15th February 2008, CEC and tie jointly reviewed the status and risk profile of every Submitted and Outstanding Package relating to Phase 1a, allowing for anticipated progress to Financial Close. The review will be updated through the period to Financial Close, allowing a fresh assessment of risk at both point of Notification of Award and at Financial Close.

The best estimate of progress by mid-March will be that 6 Prior Approvals and 9 Technical approvals will have been achieved, making a total of 15 Approved Packages. [Actual number being confirmed for Tuesday morning]

The review of the Submitted and Outstanding Packages assessed for each design package seeking Prior and / or Technical Approval :

1. The risk arising from the criticality of the package relative to the construction programme ; and

2. The risk arising from the quality and complexity of the package, which could affect timely consent

A graduated risk measurement was applied to each package for each of the two risk criteria : those packages which were required for the earliest stages of the construction programme having a higher risk rating than those required for later stages ; and more complex or sensitive packages or those with known quality issues were given a higher risk rating than those of a simpler character. The two risk ratings were multiplied together to give a risk rating tabulation across the whole population of Submitted and Outstanding Packages. The tabulation was then stratified into Critical, High, Medium and Low categories based on the risk ratings.

The people who contributed to this process and who have confirmed they are comfortable that the results are properly presented were Susan Clark (tie Programme Director), Andy Conway (CEC Tram Coordinator), Damian Sharp (tie Design Project Manager i/c of the SDS design and approval process), Tom Hickman (tie Programme Manager) and Mark Hamill (tie Risk Manager).

81 individual packages were reviewed, of which 65 were assessed as medium or low risk. The remaining 16 packages in each category were :

Submitted Packages	Critical	High
Prior Approval	0	3
Technical Approval	1	1

Outstanding Packages	Critical	High
Prior Approval	1	5
Technical Approval	3	2

Appendix 1 lists these Critical and High risk packages with a brief summary of their risk profile and the mitigating factors which can be deployed to manage the risk. [Currently being updated by T Hickman/ D Sharp and M Hamill]

Appendix 2 provides a detailed breakdown of the entire population of 81 packages.

It should be noted that there are in fact 4 Critical risk locations and 9 High risk locations as 3 packages are common to both Prior and Technical approval requirements. This will further help to concentrate efforts to manage the risk. For each location the issue is well understood and mitigation plans have been identified to ensure that the risk is being managed on an ongoing basis. Appendix 1 contains full details of these.

In overall terms, the limited number of Critical / High risk packages is no surprise given the short anticipated time to finalise the consent process relative to the overall construction programme and the extent of work done to date to meet the needs of the approval authority.

Third party approval risk

In addition to approvals by CEC a number of the Submitted and Outstanding Packages also require approval by third parties. The most frequent and significant third party approval body is Network Rail. There has been substantial informal consultation with Network Rail throughout the development of the design and Network Rail has expressed satisfaction with many of the designs in principle. Network Rail has agreed to review Submitted Packages for technical approval in parallel with the CEC consideration of those packages. This means that Network Rail will be in a position to confirm approval very soon after CEC approval is granted. This is a significant concession by Network Rail and reflects their confidence in the design following the consultation to date.

The other significant third party in this context is BAA. Within the EAL Licence, Schedule 3 allows EAL to <u>review</u> tram works data – primarily design & construction related method statements. There is a 30 day review period, and EAL could object to this data, but only on the basis of adverse impact on airport operations or safety. There is also a DRP set out in the licence if an agreed position on design change (both acting reasonably) cannot be resolved.

We are taking EAL through the design and the MUDFA works in a scheduled process of meetings (held 4 weekly, but also in the case of MUDFA, more regularly), there is nothing to suggest that the risk of designs not being accepted is low.

Forth Ports is another player, but the agreement scheduled to be signed with them, and the constructive working relationship on these issues, creates a good level of comfort.

No serious issues are anticipated with the other third parties, with whom the approval process is fairly commonplace. Overall, it is considered that the third party arrangements create no material risk to the construction programme.

Higher-level mitigations

In addition to the mitigation arising from control of the well-defined management and approval process and the limited number of Critical / High risk locations, there are a number of higher-level mitigations which are relevant to the overall evaluation.

<u>SDS Liability</u>

In relation to the Submitted and Approved Packages, one contractual feature of importance in assessing the overall risk is acceptance by SDS that they will absorb a capped exposure arising from Construction Programme delay caused by their own failings (risks A, C, D and E above). They will however accept no liability arising from CEC delay (risks B and F above). The cap they propose is likely to be c£0.5m. [Value and run rate still to be confirmed with SDS]

BBS accept this proposition, acknowledging that they will require to pursue SDS to the extent of the cap should losses arise from risks A, C, D or E. However, BBS will accept no further liability arising from the Submitted or Outstanding Packages.

A general legal protection exists whereby SDS is exposed to claims from BBS following novation for "culpable failure" which could supersede the cap.

Funding support

The uncapped exposure will carry no financial protection to tie / CEC. However, should this result in increased project cost, assuming legitimately incurred, the terms of the grant funding from Transport Scotland mean that the cost will be substantially covered by grant, to the extent that there remains headroom beneath the aggregate funding of £545m. It must be borne in mind that this factor cushions risk to tie / CEC but not to the project as a whole.

Other (less likely) leverage / options

Although it is likely that the novation terms will require full settlement of all monies due to SDS at the point of novation, it may be possible to trade this if the risks under the consent process are deemed to be uncomfortable. At present, this is not being negotiated.

Access may also be available to SDS held insurance in the event of a significant loss and tie / CEC could pursue insurance cover prior to Financial Close. This would be complex to implement and is not currently being pursued.

Existing risk contingency

The project cost contains risk contingency amounting to [£3m] linked to the consent risks described in this paper. The QRA will be refreshed in the run-up to Financial Close. It is at tie / CEC's option that the risk contingency can be retained or traded for a cash sum and full risk transfer to BBS. At present the tactic is to hold the contingency and seek to manage the risk. Tie does not expect to be able to transfer this entirely to BBS as they are unlikely to accept it in full.

Conclusion

The overlap of continuing design and approval processes with the construction programme has created a risk. Experience in the early years of managing the design and approval process was not happy, but recent initiatives have successfully developed a well-defined and effective management process, led and directed by tie / CEC. This management process will continue following Financial Close with minimum risk of interference.

A thorough risk-focussed review of the consents which will not be complete by Financial Close has been performed by competent people from tie and CEC. This has concluded that the residual risk is contained in a small number of design packages. These have been the subject of prioritisation to mitigate their risk profile.

The combination of controlling the management process and focus on the key elements of the residual risk, constitute an effective risk mitigation framework. There are other higher-level mitigations which provide further help, notably the funding arrangements and the existence of a risk contingency in the project budget.

It is the view of the tie and CEC project team that these factors can be relied upon to manage the exposure successfully.

Prior & Technical Approvals APPENDIX 1

Comment [SB1]: This section is being updated by Tom Hickman and Mark Hamill for Tuesday 11 March

Critical Risks >21	Description	Risk	Issue	Mitigations
Prior Outstanding	Murrayfield Stadium Tram Stop Murrayfield Stop retaining wall	25	Soft ground in this area	SDS/BBS agreed solution 21/02 – given to CEC for approval
Technical Submitted	Murrayfield Stop Retaining Wall	25	Soft ground in this area	In hand – 2 weeks to resolve
Technical Outstanding	Depot internal walls i.e. A8 wall on S side of depot	25	CEC need to see final design	Final design will be 1 in 2.5 slope or pins/plates. SDS need another 3 weeks to finalise then CEC to agree
Technical Outstanding	A8 underpass	25	Underpass – sewer conflict	Technical solution due to be submitted by BBS. SDS options report was issued in Jan 08
Technical Outstanding	Building Regulations approval	25	At 4 locations full planning approval is required	SDS to submit drawings for planning approval
High Risks 11 - 20		**Risk**	**Issue**	**Mitigations**
Prior Outstanding	Accommodation works – Murrayfield Murrayfield stadium retaining wall Roseburn St Bridge Murrayfield turnstiles	20	VE solution changes design	Feasibility study ongoing and due to be complete by 14/03 – on target to complete
Prior Outstanding	Jenners depository Tram stop Balgreen Road Baird Drive retaining wall Balgreen Road retaining wall Balgreen Road Bridge	15	NR issue with height of Balgreen Rd bridge	Letter required from NR. AG has emailed Brian Sydney this afternoon asking for NR's agreement in writing to the principles of NR ownership and 4.8m road clearance for Balgreen Rd bridge
Prior Outstanding	Victoria Dock Bridge	12	Clarification over design of bridge decking	SDS has in hand. Needs barge-borne boring survey.
Prior Outstanding	Depot mast A8 retaining wall Gogar depot sub station Depot internal retaining walls Depot	15	Requires SDS design programme	SDS' Ian Brown has discussed depot design with CEC Building Inspectors and agreed a practical way forward. BAA meeting due on 25th Feb. which will proscribe landscaping features to minimise risk of aircraft bird strike. For A8 retaining wall see note above. SDS believes overall resolution will be possible in approx 4 wks..
Prior Submitted	A8 underpass	15	Underpass – sewer conflict	Technical solution due to be submitted by BBS. SDS options report was issued in Jan 08
Prior Submitted	Tram Stop Picardy Place	15	Gyratory/T Junction	Awaiting CEC's Andrew Holmes decision

Prior Submitted	Tram Stop Haymarket Haymarket Viaduct Substation Haymarket Relocation of war Memorial Line of route	**20**	Road Safety audit thrown up issues requiring rework	The issues are understood and rework is estimated to be complete within 2 weeks of 22/02
Prior Outstanding	Water of Leith Bridge Murrayfield Underpass Murrayfield pitches retaining wall	**12**	Linked to the issue at Muurayfield Tramstop	SDS/BBS agreed solution 21/02 – given to CEC for approval
Technical Outstanding	Tower Place Bridge	**15**	Clarification over bridge decking	SDS has in hand. Needs barge-borne boring survey.
Technical Outstanding	Lindsay Road Retaining Wall	**15**	Design rework	Basis of design solution only very recently agreed with SDS - need design to be completed to enable associated legal agreement with Forth Ports to be signed
Technical submitted	Roseburn St Viaduct	**15**	VE solution changes design	Feasibility study ongoing and due to be complete by 14/03 – on target to complete